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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

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DEBORAH DONOGHUE,	)	
	)	
Plaintiff,	)	Civil Action No. 08-0510 (JM)(WMC)
	)	
- against -	)	Judge Jeffrey T. Miller
	)	
IMMUNOSYN CORPORATION,	)	Mag. Judge William McCurine, Jr.
ARGYLL BIOTECHNOLOGY LLC,	)	
DOUGLAS McCLAIN and	)	
JAMES T. MICELI,	)	
	)	
Defendants.	)	

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**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN OPPOSITION TO DEFENDANT'S MOTION  
TO DISMISS OR TRANSFER OR STAY THE ACTION**

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## OVERVIEW

This is a shareholder suit to recover short-swing profits on behalf of Immunosyn Corporation, a nominal defendant, from the other named defendants. These profits are alleged to have been generated through the buying and selling of shares of Immunosyn Corporation beneficially owned, some directly, some through intermediary entities, by Douglas McClain, James T. Miceli and Argyll Biotechnology LLC. The purchases and sales are alleged to have taken place within periods of less than six months and the resulting profits to have been retained in violation of 15 USC 78p(b) (more commonly known as Section 16(b) of the Securities Exchange Act).

Section 16(b), by its text, requires that any shareholder seeking to enforce its provisions must first make demand upon the issuer -- Immunosyn Corporation in this case -- and wait 60 days before filing suit, 15 USC 78p(b). Failure to make demand or, more to the point in this case, failure to observe the 60 day waiting period, exposes any non-compliant suit to dismissal *Henns v. Schneider*, 132 F. Supp. 60, 62 (S.D.N.Y. 1955). The statutory objective is to allow an issuer to address its own housekeeping obligations, *Colan v. Monumental Corp.*, 524 F. Supp. 1023, 1027 (N.D. Ill. 1981), quoting from *Mills v. Esmark, Inc.*, 91 F.R.D. 70 at 71-72 (N.S. Ill. 1981).

Plaintiff made demand on Immunosyn Corporation, in writing, on October 26, 2007, and waited out the 60 day statutory period. That fact is pleaded with specificity at paragraph 21 of plaintiff's complaint. *See: Defendant's Exhibit 1 on the motion, page 5,*

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1  
2 *par. 21.*

3 Another shareholder of Immunosy Corporation, Leon S. Segen, made demand on  
4 Immunosyn with respect to substantially the same violations "on or about October 30,  
5 2007...." *See: Defendant's Exhibit 3 on the motion, page 9, par. 47.* When during  
6 conversations with defense counsel Mr. Segen's attorney became aware of the earlier  
7 demand by plaintiff Mr. Segen determined to jump the turnstile. On or about December  
8 19, 2007, he filed suit in the Southern District of New York. Sixty days had not expired  
9 from the date of his demand, October 30, 2007. Mr. Segen's suit carries the infirmity of  
10 non-compliance with the statutory requirement of patience and is subject to dismissal at  
11 such time as the defense decides, tactically, to move. *Henss v. Schneider, supra.; Kanbar*  
12 *v. U.S. Healthcare, Inc.*, No. 89 Civ. A. 5543, 1989 WL 136522 at 5 (E.D. Pa. November  
13 8, 1989), *aff'd* 908 F.2d 962 (3rd Cir. 1990). That tactical move will no doubt await the  
14 outcome of this motion for dismissal.  
15

16  
17 Plaintiff, having waited more that 60 days and having unsuccessfully attempted to  
18 discuss the merits of the claims and defenses of the case with defense counsel, filed suit  
19 in the Southern District of New York on March 11, 2008.  
20

21 In that complaint plaintiff alleged that "some or all of the transactions to be  
22 described herein were effected in whole or in part within the Southern District of New  
23 York through market makers located within the district". *See: Defendants' Exhibit 2,*  
24 *page 5, par. 21.* Further investigation of the identity of market makers and of the public  
25 record persuaded plaintiff's counsel that the allegation was not supportable in good faith  
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2 and that the Southern District of California was the only readily identifiable valid venue.  
3 For that reason and that reason alone, with plaintiff's consent the complaint was  
4 voluntarily dismissed and suit re-filed in this district.  
5

6 The Segen complaint alleges no facts whatsoever in support of its choice of  
7 venue. It simply cites the venue statute and declares venue to be proper in the Southern  
8 District of New York. *See: Defendants' Exhibit 3, page 3, par. 10.* On this separate and  
9 distinct grounds the Segen complaint is subject to dismissal at such time as the defense  
10 chooses, tactically, to move.  
11

12 Finally, plaintiff's complaint alleges that all transactions by all entities identified  
13 in the complaint narrative are attributable to the beneficial ownership of the named  
14 defendants so that, for example, a sale by entity X may be matched against an opposite-  
15 way transaction of entity Y without reference to the formalities of record ownership and  
16 attributed to the pecuniary interests of Messrs. McClain, Miceli and/or Argyll. In this  
17 way a maximum recovery will be possible.  
18

19 The Segen complaint adopts a "group" theory of liability in which only the  
20 transactions of each entity may be matched against opposite-way transaction of that same  
21 entity. The consequence is a vast diminution in the profits recoverable if Section 16(b) is  
22 found to be implicated. The defense would, quite naturally, prefer to need only to  
23 address the Segen complaint, loaded as it is with procedural infirmities, because even if it  
24 makes its way to adjudication the bill payable will be much lightened.  
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26 Forum shopping is indeed at work. But it is not the plaintiff doing it.  
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3 **THIS SUIT WAS FILED IN THE**  
4 **SOUTHERN DISTRICT OF CALIFORNIA**  
5 **BECAUSE THIS IS WHERE IT BELONGS**

6 Section 1404(a) of Title 28 of the U.S.Code, Judiciary and Judicial Procedure,  
7 provides as follows:

8 "Sec. 1404. Change of Venue

9 (a) For the convenience of the parties and witnesses, in the interest  
10 of justice, a district court may transfer any civil action to any other  
11 district or division where it might have been brought."

12 It is for the convenience of the parties and witnesses, not for the convenience of  
13 counsel intent on holding onto a retainer, that transfers of venue may be made. A motion  
14 under Section 1404(a) is intended to place discretion in the district court to adjudicate the  
15 motion according to individualized, case-by-case considerations of convenience and  
16 fairness. Case specific facts must be weighed. *Stewart Org. v Ricoh Corp.* (1988), 487  
17 U.S. 22, 101 L. Ed. 2d 22, 108 S. Ct. 2239.

18 Messrs. McClain and Miceli and Argyll and every entity whose record ownership  
19 of shares is pleaded to give rise to beneficial ownership of Immunosyn shares by them is  
20 resident and maintains offices in the Southern District of California, not the Southern  
21 District of New York. Their address is 4225 Executive Square, Suite 260, La Jolla,  
22 California 92037. *See: Defendants' Exhibit 1, pages 3 and 4, pars. 5, 8, 11, 13, 15, and*  
23 *page 5, par. 23.*

24  
25 Immunosyn is resident and maintains its offices in the Southern District of  
26 California, not the Southern District of New York. Its address is 4225 Executive Square,  
27

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2 Suite 260, La Jolla, California 92037. *See: Defendants' Exhibit 1, page 2, par. 2.*

3 The transactions whereby Immunosyn shares were purchased or sold had one or  
4 both legs -- purchase and/or sale -- in the Southern District of California, not the Southern  
5 District of New York. *See: Defendants' Exhibit 1, page 5, par. 22.*

6  
7 Transactions records are likeliest to be located in the Southern District of  
8 California, at 4225 Executive Square, Suite 260, La Jolla, California 92037, not the  
9 Southern District of New York except to the extent that they have been supplied to New  
10 York counsel. Venue cannot be acquired for the price of the postage needed to mail  
11 evidence into another district

12  
13 Banking and brokerage records are likeliest to be located in the Southern District  
14 of California, not the Southern District of New York except to the extent that copies have  
15 been forwarded to New York counsel. The originals are still here.

16 Third party witnesses, as for example, stock brokers and market makers, are  
17 likeliest to be located in the Southern District of California, not the Southern District of  
18 New York.

19  
20 "Where, as here, the location of relevant documents and witnesses and the situs of  
21 the underlying transactions do not center in any one district, considerations of efficiency  
22 should govern." *See: Defense Memorandum, page 8.* Your Honor: they're pulling your  
23 leg!

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2 The only presence in the Southern District of New York that bears on the case is that of  
3 defense counsel who informs plaintiff's counsel and the court that he is willing to waive  
4 venue defects to retain the case in the Southern District of New York. *See: Felder*  
5 *Declaration, par. 6; Defendants' Memorandum, page 4.*  
6

7 The phrase "where it might have been brought" as it appears in Section 1404(a)  
8 does not mean "where it may now be brought, with defendants' leave, permission or  
9 consent". A district where it "might have been brought" within the meaning of Section  
10 1404(a) is a district in which the plaintiff, as an original matter and independent of the  
11 wishes of the defendant, had the right to sue. It is immaterial that the defendants, after  
12 commencement of a suit in this court, make themselves subject by consent or by waiver  
13 of venue or otherwise, to the jurisdiction of the Southern District of New York. *Hoffman*  
14 *v. Blaski*, (1960) 363 U.S. 335, 4 L. Ed. 1254, 80 S. Ct. 1084.  
15

16 Section 1404(a) presupposes that venue in at least two forums is a condition  
17 precedent for an application of *forum non conveniens*. *Ferguson v. Ford Motor Co.*  
18 (1950, D.C.N.Y.) 89 F. Supp. 45, *app. dismissed* (1950 C.A. 2) 182 F.2d 329, *cert.*  
19 *denied* (1950) 340 U.S. 851, 95 L.Ed. 624, 71 S. Ct. 79.  
20

21 The putative receiving forum must be shown to have venue. *Chicago R.I.&P.R.*  
22 *Co. v. Igoe* (1954, C.A. 7) 212 F.2d 378; *Keene v. Int'l Union of Operating Engineers*  
23 (1978 C.A. 5) 569 F.2d 1375. No such showing has been made with respect to the  
24 Southern District of New York.  
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**COMITY DOES NOT REQUIRE THE  
DISMISSAL OF A SUIT WHERE DISMISSAL  
IS SOUGHT AS A DEVICE TO DIRECT PROSECUTION  
TO A FATALLY FLAWED EARLIER FILED COMPLAINT**

This court is not required, in considering the defense motion for dismissal, to turn to blind eyes to the reality of what the defense is seeking. The action pending in the Southern District of New York is fatally flawed on two grounds:

1. Lack of venue.
2. Failure to comply with the statutory requirement of demand followed by a 60 day waiting period.

Dismissal of this action on grounds of comity would undoubtedly awaken the defense to the availability to it of a motion to dismiss the New York complaint, a possibility to which it has undoubtedly not given the slightest thought.

Additionally, the New York complaint, while resting on roughly the same facts, asserts a theory of liability which is defective and, if pursued, would result in far lower damages than under the complaint at bar.

"Beneficial ownership" of shares is broadly defined by the cases to include indirect holdings of every kind which yield pecuniary benefits to the holder. Plaintiff Donoghue has pled that a number of holdings of Immunosyn common stock by entities owned by Messrs. McClain, Miceli and Argyll can be attributed to them and cross-matched. The result is a universe of matchable transactions that covers *every* pleaded purchase and *every* pleaded sale to the extent of the pecuniary interests of Messrs

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2 McClain and Micelli and Argyll.

3 The New York action, on the other hand, adopts a theory grounded in Section  
4 13(d) of the Act and the rules thereunder which deem any combination of persons who  
5 agree to act in concert to acquire, hold, vote or dispose of shares to be a "group" and in  
6 the aggregate a person. If the "group" exceeds beneficial ownership of 10% of an issuer's  
7 securities it is deemed an insider and every member of the group is also deemed a 10%  
8 beneficial owner. This is what the New York action pleads. *See: Defendants' Exhibit 4.*

9  
10 The limitation this theory imposes, however, is that when it comes time to compute  
11 damages only the transactions of each member of the group may be matched against  
12 other-way transactions of that same group member. The universe of matchable  
13 transactions is greatly diminished in that only the sales of member X may be matched  
14 against the purchases of member X. The transactions of member X may not be matched  
15 against member Y.  
16

17 Thus, plaintiff submits, while there is an identity of parties in the New York and  
18 California actions there is not an identity of issues. And the defect in identifying issues is  
19 not with the action before this court.  
20

21 **THE DEFENSE CONCERN WITH DUPLICATIVE**  
22 **DISCOVERY IS EASILY RESOLVED**  
23 **BY APPLICATION TO THE**  
24 **JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION**

25 The defense's stated concern that witnesses and parties might be subjected to  
26 inconvenient duplicative discovery in two districts can easily be resolved by an  
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2 application to the Judicial Panel On Multidistrict Litigation. The Panel can direct that all  
3 discovery be conducted in the most logical district, the district in which all parties,  
4 primary witnesses, and the overwhelming majority of third party witnesses and  
5 documents are lodged. That is another way of saying that all discovery can be directed  
6 to the Southern District of California for the convenience of parties and witnesses ... if the  
7 Panel so decides. Once discovery is completed, the cases revert to their respective  
8 districts for trial. The complaint that has survived motion practice at that point can be  
9 tried.  
10

#### 11 CONCLUSION

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14 This suit has been filed in this court and not in New York because venue here is  
15 correct, the overwhelming weight of discovery of documents and witnesses will need to  
16 be conducted here, the underlying transactions took place here and all defendants reside  
17 or are domiciled here. Before the filing of suit the statutory waiting period was observed  
18 following statutory demand.  
19

20 The New York action lacks venue, a defect defense counsel is willing to waive for  
21 his convenience, not for that of the parties or witnesses. The New York action is subject  
22 to dismissal at any time of the defense's choosing for failure to comply with the demand  
23 requirements of Section 16(b). And the New York action has a defective theory of  
24 damages.  
25

26 It would not be in the interests of justice to dismiss the complaint in this action

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2 and leave the defense free to euthanize the New York action at its leisure.

3 The motion should be denied and the defense left to pursue discovery relief before  
4 the Judicial Panel On Multidistrict Litigation.  
5

6 Dated: Southampton, New York  
7 May 9, 2008

8 Respectfully submitted,

9 /s/ David Lopez  
10 David Lopez, Esq.  
11 Attorney for Plaintiff *pro hac vice*  
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